CASE 1: NEW CHALLENGE CASE

Issue 1: Blue Inc. did not breach its contractual obligation to Red Corp. in relation to the joint production of "Designer Zero – New Challenge."

1. In order for there to be a breach of a contractual obligation, there must first be a contractual obligation which the party failed to perform. In this case, there is no contractual provision in the Co-Production Agreement[1] which Blue Inc. failed to perform. The only provisions in the contract under which Blue Inc. is given the final authority to decide pertain to Clause 3 (d) on Ancillary Rights (except for Merchandising Rights), Clause 5 (b) on Distribution and Marketing, and Clause 10 on Derivative Works. There is no failure or defect in Blue Inc.'s performance of any of these obligations.
2. The parties' duty under the contract is one of best efforts, as opposed to a duty to achieve a specific result (2016 UNIDROIT Principles of International Commercial Contracts, Article. 5.1.4).[2] The distinction is important in order to determine whether a party has performed its obligations. Applying the parameters in Article 5.1.5 of the Principles[3] to determine the kind of duty involved herein, it is evident that the duty is one of best efforts. The parties did not stipulate a specific box office revenue or profit target. The contractual terms and degree of risk involved are likewise standard in a venture for the production of a movie. Moreover, while the parties generally exercised mutual control under the Contract, Clause 3 (b) of Exhibit 7 grants Red Corp. greater influence in the performance of the obligation pertaining to creative control. Further, it is clear from their correspondence[4] that both parties intended and understood their obligations to be one of best efforts.
3. Red Corp. claims that the loss in profit was due to Blue Inc.'s false explanation of the view of the movie review organization. However, the evidence shows that Blue Inc. did not make any false representation and only acted in good faith to ensure that the movie will reach a wider audience.
4. Blue Inc.'s explanation that the movie will be classified in Arbitria as "for adults"[5] was based on their honest belief and the clear past trends of the movie review organization.[6] Even so, upon Red Corp.'s inquiry, Blue Inc. promptly instructed its production team to directly check with the movie review organization. Thus, on the very same day, Swan of Blue Inc. emailed the movie review organization; however, Swan was met with no response.[7] In an exercise of good faith, Blue Inc. additionally asked if Red Corp. or Minna Friends was willing to renegotiate with the organization together with Blue Inc.[8]
5. It is not disputed that the change in the policy of the movie review organization was never made public in any manner. It is not even certain whether Blue Inc. could have discovered such information even if it directly checked with the organization.[9] Nevertheless, Blue Inc. still exerted best efforts to check with the organization and all throughout acted in good faith towards Red Corp.
6. Moreover, Blue Inc. made it clear that the rating of the movie review organization was not the only consideration for suggesting the change in character design. Blue Inc. considered the

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[1] INC Problem, Exhibit 7.
[2] International Institute for the Unification of Private Law (UNIDROIT), UNIDROIT Principles of International Commercial Contracts 2016, art. 5.1.4, *available at* https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf (last accessed Nov. 3, 2022) [hereinafter 2016 UNIDROIT Principles with Commentary].
[3] *Id*. art. 5.1.5.
[4] INC Problem, Exhibit 10, Blue Inc.'s e-mail dated 12 August 2019 and Red Corp.'s e-mail dated 10 August 2019.
[5] *Id.* Blue Inc.'s e-mail dated 1 August 2019.
[6] *Id*. Exhibit 16.
[7] *Id.*
[8] *Id*. Exhibit 10, Blue Inc.'s e-mail dated 6 August 2019.
[9] *Id*. Exhibit 16.

potential effect not only on the box office in Arbitria, but also in other countries. Blue Inc. likewise accounted for the overall message of health awareness that the movie would send to fans.[10] Indeed, it is established that the worldwide box office revenue, excluding Negoland, was higher by 20,000,000 USD with the change to candy than without it.[11]

7. When a party is bound by a duty of best efforts, they must exert the efforts that a reasonable person of the same kind would exert in the same circumstances, but does not guarantee the achievement of a specific result.[12] All the foregoing show that Blue Inc. fulfilled its duty of best efforts in the performance of all its obligations, and always acted for the best interests of the joint venture. The overall success of the movie in the box office is proof in itself that Blue Inc. performed its obligations with best efforts and in good faith, and Red Corp. has failed to discharge the burden of proving otherwise.
8. Therefore, it is respectfully submitted that Blue Inc. did not breach its contractual obligations to Red Corp. in relation to the Co-Production Agreement.

Issue 2: Even if Blue Inc. breached its obligation, it is not liable to pay damages to Red Corp.

9. Even assuming that Blue Inc. breached its obligation, which is vehemently denied, it would still not be liable to pay damages to Red Corp.
10. To be entitled to damages, the following requisites must be satisfied under the 2016 UNIDROIT Principles:
    a. The harm sustained is a result of the non-performance (Article 7.4.2);[13]
    b. The harm must be established with a reasonable degree of certainty (Article 7.4.3);[14] and
    c. The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance (Article 7.4.4).[15]
11. These requisites are lacking.
12. *First*. The harm must be a direct consequence of non-performance. Article 7.4.2(1) pre-supposes a sufficient causal link between the non-performance and the harm.[16] Here, Blue Inc.'s alleged false explanation is not the direct cause of the Red Corp.'s purported loss of profit. There is a crucial point beyond Blue Inc.'s control which was the efficient cause of the result that occurred – that is, Red Corp.'s sole and final decision to change the cigarette.
13. To emphasize, Clause 3(b) of Exhibit 7 grants Red Corp. the final authority on any creative matter, including whether or not to change the cigarette to candy. Thus, the direct cause of the alleged harm is not any breach on the part of Blue, but Red's act of making such final decision.
14. *Second*. The harm has not been established with a reasonable degree of certainty. Certainty pertains not only to the existence and extent of the harm. There must also be a clear connection between the certainty and the direct nature of the harm.[17] Here, while there is reasonable certainty as to the amount of profits had New Challenge been classified as "no restriction" in Arbitria,[18] there is no certainty that New Challenge would have been classified as "no restriction" in the first place.
15. Aside from the bare allegation that New Challenge would have passed the review even with the cigarette, Red Corp. failed to adduce any evidence that the Arbitrian movie review organization would have in fact classified the movie as "no restriction." Under Article 27 (1) of the 2021

[10] INC Problem, Exhibit 10.
[11] *Id*. Exhibit 15.
[12] 2016 UNIDROIT Principles with Commentary, *supra* note 2, comment on art. 5.1.4.
[13] *Id*. art. 7.4.2.
[14] *Id*. art. 7.4.3.
[15] *Id*. art. 7.4.4.
[16] *Id*. comment on art. 7.4.3.
[17] *Id*.
[18] INC Problem, Exhibit 15.

UNCITRAL Arbitration Rules,[19] "each party shall have the burden of proving the facts relied on to support its claim or defen[s]e."[20] However, aside from the lone self-serving statement in Red Corp.'s e-mail about the alleged say-so of one Mr. Nomura,[21] there is no other evidence on record that New Challenge would indeed be classified as "no restriction." Red Corp. did not present as witness either Diamond or Mr. Nomura to prove that New Challenge would have received a "no restriction" classification even with the cigarette. They did not submit any witness statement to prove the alleged facts on which their claim for damages is based.

16. Red Corp. makes a leap between the alleged non-performance and the harm claimed. However, the gap between the two not only reveals the lack of a sufficient causal link, but also leaves room for uncertainty as to the extent of the harm.
17. *Third*. Blue Inc. did not foresee, and could not have reasonably foreseen, that there would be an internal change in the policy of the movie review organization that would render its past trends unreliable. It also could not have reasonably foreseen that the change in character design would result in a decline in the box office, specifically in Negoland, whereas such change actually resulted in a higher box office revenue of all the other countries combined.
18. There being no sufficient causal link, certainty, and foreseeability in the harm, Blue Inc. would not be liable for payment of damages.
19. Assuming *arguendo* that Blue Inc. is found liable, Red Corp. would still not be entitled to the full amount of the alleged loss.
20. Article 7.4.7 of the Principles states that where harm is due in part to an act or omission of the aggrieved party [], the amount of damages shall be reduced to the extent that these factors have contributed to the harm.
21. In this case, the Contract itself delineates the power of the Parties with regard to creative control. Clause 3 (b) states:

    b. Development and Production. After approval or selection of a Treatment, Blue and Red shall have mutual creative control of the further development, pre-production and production of the Picture, **provided that in the event of a disagreement with respect to any creative matter in the Picture, Red shall have authority to make the final decision with respect to such creative matter.**[22]
22. It was in fact Red Corp., not Blue Inc., who made the final decision to change the cigarette to candy. To be sure, Red Corp. had the right under contract to completely reject Blue Inc.'s request. However, after its own independent assessment, Red Corp. decided to proceed with the change in character design. It cannot now claim that the consequences for such decision must be borne entirely by Blue Inc., who consistently acted in good faith and for the best interests of the project.
23. Whatever loss Red Corp. deems it has suffered was in fact caused by its own choices. Even if it is found that such loss was suffered, it must be attributed, if not fully, then at least partially, to Red Corp. Blue Inc.'s liability to pay compensation, if at all, must be reduced to the extent that Red Corp. contributed to such harm.

CASE 2: BLUE LAND CASE

Issue 1: Red Corp. breached its contractual obligation to Blue Inc., concerning the delivery of clothes to Blue Land.

[19] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (2021), art. 27 (1) *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf (last accessed Nov. 3, 2022) [hereinafter, 2021 UNCITRAL Arbitration Rules].
[20] *Id*.
[21] INC Problem, Exhibit 17.
[22] *Id*. Exhibit 7, clause 3 (b).

A. Red Corp. breached Clauses 4 and 8 of the Manufacturing and Supply Agreement dated 15 January 2022 (Exhibit 12)[23] when forced labor was used in the manufacturing of the clothing featuring Designer Zero motifs, or the Products as they referred to under Exhibit 12, ("Subject Clothes"), delivered to Blue Inc.

24. Clause 4 of Exhibit 12 states that the Supplier, Red Corp.,[24] must manufacture and supply the Subject Clothes "in compliance with applicable laws and regulations."[25] Under Clause 8 of Exhibit 12, the Supplier expressly warrants that the Subject Clothes will be manufactured and supplied in compliance with, among others, "all governmental regulations."[26] Clause 16 of Exhibit 12, declares that the said agreement will be governed by the 2016 UNIDROIT Principles.[27]
25. In the commentary to Article 1.4 of the Principles, the broad notion of mandatory rules covers both specific statutory provisions and general principles of public policy,[28] and mandatory rules are applicable in case of reference to the Principles as the law governing a contract.[29]
26. Thus, it is respectfully submitted that the prohibition against forced labor is a mandatory rule that is applicable to Exhibit 12 and, thus, must be read into the provisions of the same. The prohibition against forced labor, as an applicable mandatory rule, falls under the classification "applicable laws and regulations" under Clause 4 of Exhibit 12, and "governmental regulations" under Clause 8 of the same.
27. The prohibition is a national mandatory rule in both Arbitria and Negoland, as there are specific legislation in both countries that make it illegal to use forced labor, according to Exhibit 18.[30] Likewise, the prohibition against the use of forced labor is a prohibition against the violation of internationally recognized human rights,[31] and is an overriding transnational public policy, embodied in the International Labor Convention ("ILO") Forced Labour Convention of 1930 and the ILO Abolition of Forced Labour Convention of 1957, where the suppression of forced labor is declared as a fundamental policy.[32] According to Exhibit 18, both Arbitria and Negoland are state parties to these ILO conventions. Being thus, both countries have consented to be bound by such ILO conventions.
28. Therefore, in manufacturing the Subject Clothes with the use of forced labor, there was failure on the part of the Supplier, Red Corp., to comply with Clauses 4 and 8 of Exhibit 12. Because of this failure to perform the obligation in compliance with the said clauses, the Subject Clothes were manufactured and delivered to Blue Inc. in clear and evident breach of contract.

B. Red Corp. is the entity liable for breach as it failed to fulfill its mandatory obligation under Clause 4 and failed to keep its express warranty under Clause 8, in connection with the violative actions of its subcontractor and agent Black Inc.

29. It is settled that Black Inc. was the entity that directly performed the acts which violated the provisions of the contract.[33] Despite this, Red Corp. is still the entity liable for the breach.
30. *First*. The use of the word "must" in Clause 4 of Exhibit 12 created a mandatory directive on Red Corp. to observe the applicable laws and regulations during the manufacturing process. Under Clause 8 of Exhibit 12, Red Corp., as the Supplier, explicitly warranted that the clothes will be manufactured in compliance with governmental regulations. Thus, Red Corp. had the

[23] *Id*. Exhibit 12.
[24] *Id*.
[25] *Id*. clause 4.
[26] *Id*. clause 8.
[27] INC Problem, Exhibit 12, clause 16.
[28] 2016 UNIDROIT Principles with Commentary, *supra* note 2, article 1.4, comment ¶ 2, pp. 11-12.
[29] *Id*. comment ¶ 4, p. 12.
[30] INC Problem, Exhibit 18.
[31] International Labor Organization ("ILO") Declaration on Fundamental Principles and Rights at Work and its Follow-up (2022), art. 2.b.
[32] ILO Forced Labour Convention of 1930, art. 1 & ILO Abolition of Forced Labour Convention of 1957, art.1.
[33] INC Problem, ¶ 28.

corollary and sole responsibility to ensure that the subcontractor it hired would make use of a manufacturing process that complied with laws and regulations referred to under Clauses 4 and 8. Stated differently, Red Corp. has the responsibility to exercise due diligence in the hiring of the subcontractor. This, certainly, includes the responsibility for conducting human rights due diligence[34] in order to ensure that the supply chain is free from any violations of the said clauses, specifically those that infringe human rights, such as the use of forced labor.[35]

31. This due diligence responsibility covers not only an assessment of a prospective subcontractor prior to the hiring of the same, but also of control and supervision over the subcontractor's manufacturing process during the performance of the contract. Thus, when Red Corp. hired Black Inc. as its subcontractor under Clause 3 of Exhibit 12, which clause evinces Red Corp.'s sole right, and thus responsibility, to hire subcontractors,[36] Red Corp. effectively represented that Black Inc. had the capability to, and will, observe such applicable laws and regulations or governmental regulations. Thus, when Black Inc. failed to observe the same, it was a direct result of Red Corp.'s failure to exercise the required due diligence.
32. *Second*. In addition to the foregoing, it is also respectfully submitted that, upon the hiring of Black Inc. as Red Corp.'s subcontractor, a principal-agent relationship was constituted, as defined under Article 2.2.2 of the Principles.[37] Considering the necessity of supervision and control over the manufacturing process in order to ensure compliance with Clauses 4 and 8 of Exhibit 12, ample control was actually exercised, or should have been exercised by Red Corp. over Black Inc. during the stage of manufacturing. Such element of control is indicative of the principal-agent relationship. As a consequence of the existence of this relationship, and as explained under Article 2.2.3 of the Principles,[38] or 2.2.5[39] in the alternative, a legal fiction was created wherein Black Inc.'s actions affected Red Corp.'s legal position vis-à-vis Blue Inc. under Exhibit 12. Thus, when the agent, Black Inc., utilized forced labor in performing its task as subcontractor, such action bound the principal, Red Corp. It can therefore be concluded that the violative action of Black Inc. is the action of Red Corp., and this attributable action is the basis for Red Corp.'s breach of Exhibit 12.
33. *Third*. Even granting that Blue Inc. is the one that introduced Black Inc. to Red Corp., this cannot be used as a defense for Red Corp. to deny its responsibility over its subcontractor.[40]
    a. No written and express waiver, as required under Clause 14 of Exhibit 12,[41] was made by Blue Inc. in favor of Red Corp., and thus Red Corp.'s responsibility over its subcontractor under Clauses 4 and 8, in relation to Clause 3, stands.
    b. The wording of the e-mail dated 18 January 2021, found in Exhibit 13, evinces that the introduction to Black Inc. was made upon Red Corp.'s sole discretion and option.[42]
    c. Blue Inc.'s act of introducing Black Inc. is a distinct and separate act from Red Corp.'s act of unilaterally hiring Black Inc. as its subcontractor.[43]
    d. Blue Inc.'s opinion as to the trustworthiness of Black Inc. was made in good faith, and such was based on facts relevant to the time that Blue Inc. had a business relationship with Black Inc., which was a time when Black Inc. was not utilizing forced labor.[44]
    e. Mr. Work Black's status as a former employee does not, in any way, make Blue Inc. responsible for the former's action.

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[34] United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), II.A.15 (b) in relation to II.B.17 (a) [hereinafter UN Guiding Principles on Business and Human Rights].
[35] *Id*. II.A.12.
[36] *Id*. Exhibit 12, clause 3.
[37] 2016 UNIDROIT Principles with Commentary, *supra* note 2, art. 2.2.2.
[38] *Id*. art. 2.2.3.
[39] *Id*. art. 2.2.5.
[40] INC Problem, Exhibit 18.
[41] *Id*. Exhibit 12, clause 14.
[42] *Id*. Exhibit 13.
[43] *Id*. ¶ 21.
[44] *Id*. ¶ 28.

f. Red Corp. is the one responsible for carrying out human rights due diligence in order to identify Black Inc.'s violative processes, and to prevent the same.[45] Red Corp. failed to do so considering that it merely inquired from Black Inc.'s president and workers[46] without actually conducting further independent investigations or assessments which might have revealed the forced labor issues in the first place. Blue Inc., on the other hand, in order to mitigate Red Corp.'s failure at due diligence, immediately called for an investigation and verification of the forced labor accusations,[47] as soon as such were revealed, and publicly announced the termination of its business relationship with Black Inc., and a review of its global supply chain.[48]

34. It is therefore respectfully concluded that due to Red Corp.'s failure to observe Clauses 4 and 8 of Exhibit 12, there is failure to perform its express obligation under the contract, or at the very least, only defective performance, and thus, there is non-performance, as defined under 7.1.1 of the Principles.[49]

Issue 2: Red Corp. has to pay damages to Blue Inc. in the total amount of 21,130,000 USD.

A. Being liable for breach of its obligation, Red Corp. has to pay Blue Inc. the total amount of 21,130,000 USD, as this is the full compensation for the pecuniary harm sustained as a result of Red Corp.'s non-performance.

35. It is settled in the facts that Blue Inc. suffered damages or harm in the following amounts, and due to the following circumstances:
    a. 15,000,000 USD[50] for the temporary closure of Blue Land from 23 December 2021 to 4 January 2022;
    b. 800,000 USD[51] for the return and refund of the Subject Clothes sold at Blue Land; and
    c. 5,330,000 USD[52] for the diminished views of the movie "Designer Zero - Friendship" on Blue Net for December 2021 to January 2022.
36. It is respectfully submitted that, relation to these damages incurred or harm suffered by Blue Inc., the requisites for entitlement to damages, as outlined in Articles 7.4.2,[53] 7.4.3,[54] and 7.4.4[55] of the Principles, all exist.
37. *First*. There is a sufficient causal link to prove that the harm is a result of the non-performance of Red Corp. in failing to exercise due diligence and preventing the use of forced labor in the manufacturing of the Subject. The temporary closure of Blue Land, which was evaluated as an appropriate response by the crisis management experts in Arbitria,[56] occurred because of the bomb threats and demonstrations around the theme park, which in turn were directly caused by the revelation that forced labor was used in the manufacturing of the Subject Clothes sold at Blue Land.[57] Likewise, the clamor for the return and refund of the Subject Clothes was also directly caused by the involvement of forced labor in the manufacturing process,[58] and Blue Inc. had to accept the return and refund due to requirement of Arbitrian laws against the use of forced

[45] UN Guiding Principles on Business and Human Rights, *supra* note 34, II.15 (b) in relation to II.17 (a).
[46] INC Problem, ¶ 21.
[47] *Id*. ¶ 28.
[48] *Id*. ¶ 29.
[49] 2016 UNIDROIT Principles with Commentary, *supra* note 2, art. 7.1.1.
[50] *Id*. ¶ 30.
[51] INC Problem, ¶ 30.
[52] *Id*. Exhibit 11, in relation to Exhibit 8, clause 2 (3), and in relation to ¶ 17.
[53] 2016 UNIDROIT Principles with Commentary, *supra* note 2, art. 7.4.2 (1).
[54] *Id*. article 7.4.3 (1).
[55] *Id*. article 7.4.4.
[56] INC Problem, ¶ 30.
[57] *Id*. ¶ 27.
[58] *Id*. ¶ 30.

labor.[59] Further, it is settled in the facts that the diminished views of "Designer Zero – New Challenge" on Blue Net in December 2021 to January 2021 was "due to the issue concerning Black Inc. related to 'Designer Zero' clothes."[60]

38. *Second*. It is settled in the facts that the damages incurred by Blue Inc. actually occurred, and such harm is in the total amount of 21,130,000 USD. Due to such undisputed occurrence[61] and determination of the extent of harm,[62] the requirement of certainty of harm is readily fulfilled.
39. *Third*. The harm suffered by Blue Inc. was foreseeable at the time of the conclusion of Exhibit 12. Arbitria is a country that plays a leading role in world economy and has close relationship with Negoland.[63] Considering that Red Corp. willfully engaged into a multi-contract with Blue Inc., a world-famous company from Arbitria,[64] Red Corp. must have been, or should have been, aware that people in Arbitria have a very strong awareness regarding human rights violations.[65] Notably, in the short span of time from 2020 to the present, three well-known companies in Arbitria have been heavily criticized by society and subjected to boycotts or forced to close their shops because they were doing business with foreign suppliers with working conditions that violated workers' human rights.[66] Red Corp. had reasonable access to the foregoing information and, thus, should have foreseen that harm would be incurred by Blue Inc., in some way or another, to the extent that business and revenue will be lost, if it is found that forced labor is utilized during a manufacturing processing within any of Blue Inc.'s supply chain.
40. In line with the presence of all the requisites, it is thus submitted that the harm incurred by Blue Inc. due to the non-performance of Red Corp. is fully compensable.

B. Red Corp. is liable to pay the full amount of 21,130,000 USD to Blue Inc. considering that Blue Inc. has no contribution to the harm that it incurred.

41. Article 7.4.7 of the Principles states that the amount of damages shall be reduced to the extent that the aggrieved party contributed to the harm.[67] It is respectfully submitted, however, that Blue Inc. had no such contribution.
42. While Blue Inc. introduced Black Inc. to Red Corp., such is not a contribution to the harm incurred because, as pointed out earlier, such does not remove the responsibility from Red Corp. to determine the worthiness of a subcontractor, and the responsibility from Red Corp. to oversee such subcontractor. As explained, the hiring of Black Inc. was a unilateral choice made by Red Corp. pursuant to Clause 3 of Exhibit 12.[68]

    It should likewise be noted that the temporary closure of Blue Land, which was even assessed as an appropriate response by crisis management experts, cannot be considered contributory as well. In fact, the temporary closure of Blue Land is actually a mitigation of further harm that could have been incurred, as it prevented further danger and damage that would have been the proximate result of Red Corp.'s utilization of forced labor in the manufacturing of the Subject Clothes. Notably, the taking of reasonable steps to reduce harm is provided in Article 7.4.8 of the Principles,[69] and such was actually performed by Blue Inc. in temporarily closing down Blue Land, and in appeasing the Arbitrian public through a news conference.[70]

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[59] *Id*. Exhibit 18.
[60] *Id*. Exhibit 11.
[61] 2016 UNIDROIT Principles with Commentary, *supra* note 2, art. 7.4.3, comment ¶ 1.
[62] *Id*. comment ¶ 2.
[63] INC Problem, ¶ 2.
[64] *Id*. ¶ 6.
[65] *Id*. ¶ 27.
[66] *Id*.
[67] 2016 UNIDROIT Principles with Commentary, *supra* note 2, art. 7.4.7.
[68] INC Problem, Exhibit 12, clause 3.
[69] 2016 UNIDROIT Principles with Commentary, *supra* note 2, art. 7.4.8 (1).
[70] INC Problem, ¶¶ 29-30.

CASE 3: CARD CASE

Issue 1: The arbitral tribunal does not have jurisdiction over the matter at hand.

43. The arbitral tribunal lacks jurisdiction over the Card Case precisely because of the way the arbitration agreements are worded in the Exhibits related to this matter which are contained in Exhibits 4 (First Co-Production Agreement for the "Friendship" movie),[71] 7 (Second Co-Production Agreement for the "New Challenge" movie),[72] and 9 (Agreement between Red Corp. and Minna Friends on Blue Net).[73] Exhibits 4 and 7 relate to the selling of cards in Blue Land, while Exhibit 9 relates to the distribution of "New Challenge" via Blue Net.
44. As can be gleaned from Exhibit 9, however, the parties to the agreement are Red Corp. and Minna friends, and Blue Inc. is not included as a party. Therefore, it is respectfully submitted that since Blue Inc. is not a party to this agreement, Red Corp. may only file an arbitral case against us based on Exhibits 4 and 7.
45. Clause 21 (f) of Exhibit 4 states that disputes arising from the Agreement "**shall** be settled in a friendly manner through negotiations."[74] It is only when "no settlement can be reached" between the parties that "the case **may** then be submitted for arbitration."[75]
46. Clause 21 (f) of Exhibit 7 likewise has a similar proscription. In this Agreement, there is a multi-tiered arbitration provision which requires the parties to undergo negotiation first, as it states that the parties "**shall** attempt to resolve it through good faith negotiations."[76] If no resolution is borne out of the negotiations "after a period of three months," then they "**shall** attempt mediation by a mediator appointed by both parties."[77] If the dispute remains unsolved for a period of six months, then the parties "**may** apply for arbitration."[78]
47. It is quite clear from these arbitration agreements that a precondition to arbitration is the conduct of negotiations, and also mediation. The mandatory "shall" which qualifies the resort to negotiation and mediation embodies the intention of the parties not to resort to arbitration, unless necessary preconditions have been met.
48. In these cases as well, resort to arbitration is qualified by the permissive word "may," which does not require both parties to go to arbitration.
49. In addition, since both Exhibits 4 and 7 state that the seat of arbitration is in Japan,[79] the 2003 Arbitration Act of Japan[80] finds application in this case. Article 26[81] of the law, which talks about the Rules of Procedure in an arbitration, gives us a step by step guide on how to go about it. On the first level, the law states that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings",[82] meaning the arbitral agreement/clause applies primarily. Absent this, or "failing such agreement as prescribed in the preceding paragraph," the law states that on the second level the tribunal should "conduct the arbitral proceedings in such manner as it considers appropriate."[83] On the third level, "failing such agreement as prescribed in paragraph [one,] the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence."[84]

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[71] *Id*. Exhibit 4.
[72] *Id*. Exhibit 7.
[73] *Id*. Exhibit 9.
[74] *Id*. Exhibit 4, clause 21 (f).
[75] *Id*.
[76] INC Problem, Exhibit 7, clause 21 (f).
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] Arbitration Act, Act No. 138, August 1, 2003 (Japan).
[81] *Id*. art. 26.
[82] *Id*. art. 26 (1).
[83] *Id*. art. 26 (2).
[84] *Id*. art. 26 (3).

50. The 2003 Arbitration Act of Japan, therefore, is clear in stating that the arbitral clause agreed upon by the parties is paramount and any necessary preconditions required by this should be followed, else the tribunal shall not have any jurisdiction.
51. Blue Inc. also submits that the more restrictive Clause 21 (f) found in Exhibit 7 applies as this is the latest agreement signed between Blue Inc. and Red Corp. Exhibit 7 was signed on March 1, 2019,[85] while Exhibit 4 was signed on February 10, 2016.[86]
52. In *Monde Petroleum SA v. Westernzagros Ltd*,[87] the High Court of England and Wales stated that a dispute resolution clause in a later agreement "should be construed on the basis that the parties are likely to have intended that it should supersede the clause in the earlier agreement and apply to all disputes arising out of both agreements."[88]
53. Further, Clause 21 (e) in Exhibit 7 states that the Agreement "supersedes and replaces any prior correspondence, negotiations, agreements, understandings and representations with respect thereto."[89] It is respectfully submitted that this also applies to the arbitration clause.
54. In *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,[90] the Fifth Circuit of the United States Court of Appeals found that the parties "did not contemplate the performance of two independent contracts but the performance of a single project consisting of two closely related parties"[91] hence the contracts were integrated and that courts and tribunals have long "recognized that claims arising under integrated contracts may be consolidated into single arbitrations." The Court further noted that the parties also "agreed to the application of the UNCITRAL Rules, which permit a tribunal to conduct an arbitration 'in such manner as it considers appropriate.'"[92]
55. In addition to this, it can be seen from Red Corp.'s own words in Exhibit 19 that they prefer negotiation and mediation instead of going to arbitration. In the e-mail dated 8 June 2022, Red Corp. said to Blue Inc. that the "dispute resolution clause was included in the joint production agreement for 'New Challenge' as we thought at the time of the conclusion of the agreement that it would be better to go through negotiation and mediation with professionals instead of right away going to arbitration."[93] Their own words belie their stand that arbitration is the proper remedy.
56. As the preconditions listed in Clause 21 (f) in Exhibit 7 to go to negotiations first, then to mediation, before moving on to arbitration were not followed, therefore the court has no jurisdiction to hear the claims of Red Corp.

Issue 2.1: Blue Inc. has the right to distribute "Designer Zero – New Challenge" through Blue Net and to sell cards at Blue Land.

57. With regard to Blue Inc.'s right to sell cards at Blue Land and distribute "New Challenge" in Blue Net, it is respectfully submitted that Blue Inc. has the right to do so.
58. Clause 5 of Exhibit 9 states that Minna Friends, the Author, specifically "agrees that the film will be distributed through Blue Net."[94]
59. Meanwhile, Clause 9 of Exhibits 4 and 7 which are worded in the same manner, provides that while Blue and Red jointly own proprietary rights to the Designer Zero brand, it is Blue Inc. who is given the "sole and exclusive right and obligation to register, administer and enforce

[85] INC Problem, Exhibit 7.
[86] *Id*. Exhibit 4.
[87] *Monde Petroleum SA v. Westernzagros Ltd* [2015] EWHC 67 (Comm) (22 January 2015).
[88] *Id*. ¶ 39.
[89] INC Problem, Exhibit 7, clause 21 (e).
[90] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, Nos. 02-20042, 03-20602 (U.S. Ct. App. 2004, 5th Cir.)
[91] *Id*.
[92] *Id*.
[93] INC Problem, Exhibit 7, Red Corp's e-mail to Blue Inc. dated 8 June 2022.
[94] INC Problem, Exhibit 9, clause 5.

such jointly-owned copyrights, trademarks and other intellectual property rights in the joint name of Red and Blue, and [ ] exclusive distribution and exploitation rights to the Pictures, Interactive Works and Ancillary Rights relating thereto in perpetuity in any and all media now known or unknown and by any and all means or devices now known or unknown subject to the provisions of this Agreement."[95]

60. Further, Clause 10 (1) of Exhibits 4 and 7, which are likewise similarly constructed, talk about Derivative Works which are "any work based upon the Picture or any characters therefrom or story or other elements thereof, including without limitation sequels, prequels, remakes, made-for-home video productions, television productions, and Internet websites."[96] In Clause 10 (2) of the same exhibits, while Blue and Red have mutual control on whether or not to "develop, produce[,] or otherwise exploit any [d]erivative [w]orks,"[97] Blue's decision governs should there be any disagreement with regard to developing, producing, or otherwise exploiting such works.[98]
61. In addition to the foregoing, as can be seen in Exhibit 19, it is clear from the e-mail exchange between Blue Inc. and Red Corp. that the former had obtained consent from Minna Friends, the Author, for the card sales and distribution of "New Challenge" through Blue Net.[99]

ISSUE 2.2: Blue Inc. is not obligated to pay part of the revenue generated from the distribution of "New Challenges" through Blue Net and the sale of cards.

A. The parties' common intention is to exclude Blue Net's distribution of "New Challenge" from being subjected to revenue sharing.

62. As opposed to "Friendship", where parties have contracted on division of revenue for distribution through Blue Net;[100] there is no such arrangement for "New Challenge."
63. A reasonable person in the parties' position would have foreseen the potential to profit from movie distribution, per Article 4.1. (2) of the Principles[101] which states that if a common intention of the parties is unable to be discerned from the contract, then it shall be interpreted "according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."[102] Hence, the fact that parties failed to contract on the division of revenue permits the inference that Red Corp. has no intention to claim any portion of the revenue.

B. **The Co-Production Agreements exclude sale of cards from revenue division.**

64. Clause 3 (d) (ii) (B) of both co-production agreements (Exhibit 4 and Exhibit 7) states that: '"Merchandising Rights' means the right to make, use, **sell** or exercise and license or authorize others to make, use, sell, exercise or otherwise exploit tangible personal property, of any and all kinds, based upon, **utilizing or embodying any Picture** or Interactive Work."[103]
    It is beyond doubt that sale of cards which portrays the scenes of movies fall squarely under this definition.
65. Clause 8(ii) of Exhibit 4, which is the receipt division clause in the co-production agreement for "Friendship," stipulates that the parties only agreed to divide revenue on ancillary rights and interactive works, and intentionally omitted the obligation to share the revenue generated from

[95] *Id*. Exhibits 4 & 7, clause 9.
[96] *Id*. Exhibits 4 & 7, clause 10 (1).
[97] *Id*. clause 10 (2).
[98] *Id*.
[99] *Id*. Exhibit 19, Blue Inc.'s e-mail to Red Corp. dated 3 June 2022.
[100] INC Problem, Exhibit 8, clause 2 (3).
[101] 2016 UNIDROIT Principles with Commentary, *supra* note 2, art. 4.1 (2).
[102] *Id*.
[103] INC Problem, Exhibits 4 & 7, clause 3 (d) (ii) (B).

exercising of merchandising rights.[104] The difference between these rights is clearly made out in Clause 3 (d) (ii) of Exhibit 4.[105] Given this distinct use, sharing the revenue of cards will be inconsistent with the contract.

66. In relation to the co-production agreement of "New Challenge" in Exhibit 7, Clause 8 on revenue division and Clause 3(d) (ii) are drafted in a similar manner as the first agreement. Thus, for the same reason as stated above, sale of card is not subjected to revenue sharing under the contract.

C. Assuming *arguendo* that there is revenue sharing between the parties, the revenue payable shall be limited to only 1/3 of the revenues.

67. The parties had agreed that Red Corp. shall be entitled for 1/3 of the revenue for "Friendship".[106] Since there is no fundamental change in circumstances which warrants a higher portion of revenue sharing, that percentage should remain.

ISSUE 2.3: This arbitral tribunal should not grant the injunction sought by Red Corp.

68. Red Corp. sought an injunction to stop the movie distribution and card sale, and it falls under Article 26 (2) (a) of the 2021 UNCITRAL Arbitration Rules which defines interim measures as "an order to maintain or restore the status quo pending determination of the dispute."[107]

69. Therefore, by virtue of Article 26 (3), Red Corp. need to prove three things to this tribunal.[108] First, the damage is irreparable by monetary awards; second, the balance of convenience lies to Red Corp.; and third, there is reasonable possibility of success in Red Corp.'s claim. If Red Corp. fails to prove either one of these three preconditions, the injunction should be denied.

A. **A monetary award is sufficient to remedy the damage caused to Red Corp., if any.**

70. It is to be noted that it is not even clear in the first place whether Red Corp. has incurred any loss, because there is no evidence showing Blue Inc.'s activities have affected Red Corp.'s distribution business or merchandising sales. Even if it did, it is respectfully submitted that this pure economic loss can be compensated by damages at the point of a final award by the tribunal, hence there is no need for an injunction.

B. **The harm resulting from the injunction would outweigh the harm mitigated for Red Corp**.

71. If the distribution of New Challenges stops, the viewership of Friendship will drop from 400,000 views per month to 100,000 views per month as can be gleaned from Exhibit 11.[109] Each view generates 2 USD,[110] and, Blue Inc. will take 2/3 of it.[111] A simple mathematical calculation shows that Blue Inc. will incur a loss of 400,000 USD per month if the injunction is ordered.
72. In addition, according to Exhibit 14, the sales of Designer Zero clothes will drop by half if distribution of "New Challenge" ends, which translates to a further loss of 40,000 USD per month suffered by Red Corp.[112]

[104] INC Problem, Exhibit 4, clause 8 (ii).
[105] *Id*. clause 3 (d) (ii).
[106] *Id*. clause 2 (3).
[107] 2021 UNCITRAL Arbitration Rules, *supra* note 19, art. 26 (2) (a).
[108] *Id*. art. 26 (3).
[109] INC Problem, Exhibit 11.
[110] *Id*. ¶ 17.
[111] *Id*. Exhibit 8, clause 2 (3).
[112] *Id*. Exhibit 14.

73. To add insult to injury, Blue Net's business is very much dependent on the distribution of New Challenge. Blue Net has about 50 million viewers worldwide,[113] but New Challenge alone brings 2 million viewers every month, which amounts to 4% of the total viewership.[114] If this injunction is granted, it will significantly damage the reputation of Blue Net as a reliable and consistent online distributor and risk the loss of brand loyalty. These losses are unquantifiable.
74. In contrast, there is no demonstrable loss suffered by Red Corp.; and whatever loss, if any, can always be remedied by a profit-sharing mechanism at the end. Therefore, the balance of convenience lies with Blue Inc..
75. Thus, the arbitral tribunal should not grant the injunction sought by Red Corp.

[113] *Id*. ¶ 6.
[114] *Id*. Exhibit 11.